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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-673

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No. 607

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

INDEX

	Page
Argument	3
Jurisdiction	1
Opinion below	3
Specifications of Errors	3
Statement of the Case	2

Authorities Cited

Indiana ex rel. Anderson vs. Brand, 303 U. S. 95	2, 4
Morrison v. Board of Education — Wis. —, 297 N. W. 386	5
State ex rel. Dudgeon v. Levitan, 181 Wis. 326	5
State ex rel. O'Neil v. Blied, 188 Wis. 442	5
State ex rel. Nyberg v. School Directors, 190 Wis. 570	5
State ex rel. Karnes v. Board of Regents, 222 Wis. 542	5
State ex rel. Mellen v. Teachers, etc., 185 Wis. 653	5

Statutes Cited

28 U. S. C. 344	1, 2
Chap. 510 Laws of Wis. 1909	2
Sec. 42.55 (18) Wis. Statutes	2
Sec. 42.55 (12) (k) Wis. Statutes	2, 3
Constitution of the U. S. Art. 1, Sec. 10	6

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I.

JURISDICTION

The jurisdiction of this Court is invoked under *Judicial Code,* Section 237, 28 U. S. C. 344.

The date of the final judgment of the Supreme Court of the State of Wisconsin is June 12, 1941. No petition for rehearing was filed.

The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237, 28 U. S. C. 344.

The following case among others sustains the jurisdiction of this Court:

> *Indiana ex rel. Anderson vs. Brand,* 303 U. S. 95, 82 L. Ed. 685, 58 S. C. 443.

II.

STATEMENT OF THE CASE

Petitioner, who had been a teacher in the public schools of Milwaukee for 50 years, was removed by respondent in 1939.

In 1909 the first teacher's retirement and pension law in Wisconsin, applicable to Cities of the first class, was passed, Chap. 510, Laws of Wis. 1909, now Sec. 42.55 (18) Wis. Statutes. The provision of this law (17) which governs the case appears in the petition, page 3. It appears in substantially its original form in Section 42.55, Statutes of Wisconsin.

As to all teachers in the service at the time of the passage of the act, membership in the pension fund provided by it was voluntary. As to all teachers obtaining employment after the passage of the act, membership was automatic.

Petitioner filed her voluntary consent and thereby came under the act and made the required monthly payments of $2.00 per month.

Petitioner was removed from the service under an amendment to Section 42.55 of the Statutes passed in 1937 and designated 42.55 (12) (K) which is set out in

the petition, page 4, and which provides for the mandatory retirement of every teacher upon reaching the age of 70 years.

The foregoing facts are undisputed and it is admitted and also undisputed that petitioner was efficient and of good behavior and that she was not removed for cause.

III.

OPINION BELOW

The Supreme Court of Wisconsin decided that the act of 1937, Section 42.55 (12) (K) was intended to be retroactive and to apply to all teachers in the service prior to its enactment. Therefore, it was held to apply to petitioner. It held further that the act of 1909, 42.55 (18), while making the employment of the teacher permanent, did not create a contract.

SPECIFICATION OF ERRORS

The Supreme Court of Wisconsin erred:

1. In sustaining the judgment of the Circuit Court of Milwaukee County.

2. In deciding that there was no contract between petitioner and the City of Milwaukee.

ARGUMENT

I.

Elements of Contract Present

The act of 1909 upon which petitioner bases her claim, now Section 42.55 (18) of the Statutes of Wisconsin, provided for voluntary membership in the pen-

sion and retirement fund by teachers in the service at the time of its passage. It, therefore, held out an offer to all teachers then in the service to accept its provisions or not as they saw fit. Upon acceptance they assumed certain obligations, among them being the payment of monthly contributions, and they were given certain benefits. There is, therefore, present the fundamental basis of contract; an offer which ripens into a contract by acceptance and then forms a bilateral obligation.

Petitioner accepted the offer and bound herself to perform the contract on her part. It is undisputed that she did so perform by rendering services as required as a teacher and by paying the requisite contributions over a long period of years.

It is submitted therefore, that notwithstanding the absence of the word contract the essence of the relation is present. Therefore, the decision of this Court in *Indiana ex rel. Anderson vs. Brand,* 303 U. S. 95, is applicable. Here as there, the legislature by the act of 1909 announced a new policy and held out to teachers who chose to come under the law that their employment would be permanent. A teacher who accepted the provisions of the act did so in the expectation that, if she performed her obligations under the contract and made her payments under the laws, she would have a right to a permanent position. Certainly it cannot be reasonably said that when she so accepted she expected that the legislature might at any time and for any reason terminate her contract. Therefore, it is submitted that the decision of the Supreme Court of Wisconsin is erroneous because it disregards and misinterprets the very nature of the law and the action of the parties.

II.

The State of Wisconsin Interpreted the Law as a Contract

From the very first decision upon the Statute the Supreme Court of Wisconsin has interpreted it as creating contractual rights.

State ex rel. Dudgeon v. Levitan, 181 Wis. 326.

State ex rel. O'Neil v. Blied, 188 Wis. 442.

State ex rel. Nyberg v. School Directors, 190 Wis. 570.

State ex rel. Karnes v. Board of Regents, 222 Wis. 542.

State ex rel. Mellen v. Teachers, etc., 185 Wis. 653.

It had, therefore, been the law of Wisconsin for a long period of years prior to petitioner's removal that the law under which she held her position gave her contractual rights. Every teacher who accepted employment under the act of 1909 after the decisions of the Supreme Court did so in reliance upon the announced statement of the State of Wisconsin that a contract was being entered into between the teacher and the City.

Even as late as this year the Supreme Court of Wisconsin, while holding that another act which provided for permanent employment as to teachers in schools other than in cities of the first class did not create contractual obligations, held that a teacher's retirement act was intended to create a contract. Thus in

Morrison v. Board of Education, — Wis. —, 297 N. W. 386,

the Court said in, deciding a case not based on a pension or retirement law,

> "The Teachers' Retirement Act sufficiently evidences a purpose to create contractual rights in teachers."

Thus the Supreme Court of Wisconsin, as late as April 15, 1941, was of the opinion that the law in question here created contractual rights. It is submitted that under Article I, Section 10 of the Constitution of the United States the Supreme Court of Wisconsin could not hold to the contrary in the present case without impairing the obligations of petitioner's existing contract.

It is therefore submitted that upon the undisputed facts the discharge of petitioner was in violation of a contract; that the intent to create a contract is clear from the provisions of the act in question and that the interpretation and construction by the Supreme Court of the State of Wisconsin to the effect that the act did create contractual obligations made it unconstitutional for the State of Wisconsin to abrogate the rights of petitioner violated Article I, Section 10 of the Constitution of the United States. Therefore, it follows that petitioner's constitutional right has been violated.

It is, therefore, respectfully submitted that the writ of certiorari should be granted as prayed for and the decision of the Supreme Court of Wisconsin should be reviewed.

Respectfully submitted,

A. W. RICHTER,
Counsel for Petitioner.